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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 75

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

vs.

NACIREMA OPERATING CO., INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Of Counsel.

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Respondent's brief is based fundamentally on two erroneous conceptions which are repeated on nearly every page.

Respondent asserts that petitioner had actual knowledge of the defective condition of the winchman's shelter and it also states that petitioner "offered" or "furnished" the shelter to respondent and in so doing impliedly warranted that it was in seaworthy condition, that is, fit for the purpose and not dangerous to personnel.

As to the matter of knowledge, respondent's brief contains no single reference to the record. In fact there is not a scintilla of evidence in this case that any member of the ship's complement had any knowledge of the unsafe condition of the shelter. Constructive notice is not actual knowledge, and the cases cited by respondent make it abundantly clear that it is actual knowledge which may bar a right to indemnity under the laws of New York and other jurisdictions.

As to the contention that respondent was the beneficiary of an implied warranty, it has been demonstrated on page

13 of our principal brief that the factual situation was not consistent with the existence of any such implied warranty for the reason that the shelter cannot be considered as having been furnished by petitioner to respondent.

We submit, furthermore, that respondent is precluded by the verdict of the jury from now maintaining that the shelter was "offered" to it. On the negligence count, on which the jury returned a verdict for plaintiff Connolly, the court charged the jury that they would have to find that petitioner had an opportunity to see the shelter, that it did see it, and that it took no steps to make it fast and keep the piece of dunnage in place (R. 106). As to unseaworthiness, however, the Court said (R. 106):

> "Now, I have said that seaworthiness means that the gear and the ship itself and its appurtenances must be fit for the job that they are used for. Whether or not this shelter constitutes one of those fittings is for you to determine and to find from all the facts whether that was an appurtenance of the ship and whether or not its condition rendered the ship unseaworthy."

As the uncontradicted evidence has established that the shelter was not safe, it necessarily follows that the jury found that the shelter was not an appurtenance of the ship. Its verdict in favour of petitioner on the unseaworthiness count has therefore established that there was no breach of any implied warranty from petitioner to the longshoremen.

Under *Seas Shipping Co.* v. *Sieracki* (1946), 328 U.S. 85, relied upon by respondent, there is much stronger ground for arguing that there was a warranty in favor of plaintiff Connolly, the longshoreman, than there is for arguing that there was a warranty in favor of the respondent stevedoring company. In fact, respondent evidently treats a warranty in favor of longshoremen, and a warranty in favor of respondent employer-stevedore as one and the

same thing. Respondent's present contention, therefore, that petitioner breached a warranty in respondent's favor, is not only completely inconsistent with but is negatived by the jury verdict.

Another glaring error is reiterated in respondent's brief. At page 13 respondent's brief states:

> "So far as the claimed breach of contract is concerned, there were two contracts involved here and petitioner does not make it clear which contract he claims was breached."

And at page 14 respondent's brief states:

> "The contract to unload at Boston made by respondent with petitioner was separate and distinct from the contract made at New York."

The record is to the contrary. The testimony of Captain Dantzler, vice-president of respondent (R. 63-67), during which pertinent portions of the single stevedoring contract were read to the jury, conclusively indicates that there was but one contract covering all stevedoring work done by respondent for petitioner, both at New York and at Boston. The contract itself was marked for identification as Exhibit A (R. 65). The document was excluded from evidence because of respondent's objection that portions of it (relating to insurance) were "irrelevant".

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted.

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